Supreme Court, U.S.
FILED

(1)

03 242 AUG 14 2003
No.
OFFICE OF THE CLERK

# In the Supreme Court of the United States

MANOHAR SURANA

*Petitioner,*

V.

UNITED STATES OF AMERICA

*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

ALVIN E. ENTIN, ESQ.
Counsel of Record

Entin, Margules, and Della Fera, P.A.
Autonation Tower Suite 1970
110 Southeast 6th Street
Fort Lauderdale, Florida 33301
Telephone (954) 761-7201
Facsimile (954) 767-8343

American Financial Printers (202) 464-5500

81 pp

## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals Erred When it Denied a Certificate of Appealability Without Merit Review after District Court Denial of a Certificate of Appealability?

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition are:

Kendall Coffey, former U.S. Attorney

Alvin E, Entin, Esq., Surana's Appellate Counsel

Honorable Paul C. Huck, U.S. District Court Judge

Marcos Daniel Jimenez, United States Attorney

Guy Lewis, former U.S. Attorney

Michael J. Mullaney, A.U.S.A.

Manohar Surana, Appellant

Frank H. Tamen, A.U.S.A.

William Turnoff, United States Magistrate-Judge

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 4

CONCLUSION ..... 12

APPENDICES ..... App-1

APPENDIX A–Surana v. United States, #02-CV-22289 ..... App-1

APPENDIX B–Complaint /28 U.S.C. 2255 ..... App-11

APPENDIX C–Order of Dismissal ..... App-50

APPENDIX D–Surana Notice of Appeal and

COA Request . . . . . App-51

APPENDIX E–Order Denying Certificate of Appealability . . . . . App-55

APPENDIX F–Second Order Denying COA . . . . . App-57

APPENDIX G–USCA Order Denying COA . . . . . App-59

APPENDIX H–USCA Panel Order Denying COA . . . . . App-60

## TABLE OF AUTHORITIES

### CASES


Barefoot v. Estelle, 463 U.S. 880 (1983) 4, 9, 10, 11

Boykin v. Alabama, 395 U.S. 238 (1969) ..... 4

Duncan v. Walker, 533 U.S. 167 (2001) ..... 11

Hohn v. United Districts, 524 U.S. 236 (1998) ... 9

Houchin v. Zvaras, 924 F.Supp. 115 (D. Colo. 1996) 4

Lozada v. Deeds, 498 U.S. 430 (1991) ..... 4

McCarthy v. United States, 394 U.S. 459 (1969) .. 3

Miller-El v. Cockrell, 527 U.S. 322 (2003) ... 5, 6, 7

Miller-El v. Johnson, 261 F.3d 445 (2001) ..... 8

Slack v. McDaniel, 529 U.S. 473 (2000) ..... 4, 7, 8, 9, 10, 11

Williams v. Taylor, 529 U.S. 362 (2000) ..... 11


### STATUTES AND RULES


United States Constitution, Amendment 5 ..... 2

28 U.S.C. 1251(1) ..... 2

28 U.S.C. 2253 ..... *passim*

28 U.S.C. 2255 ..... *passim*

Federal Rules of Criminal Procedure, Rule 11 ... 3

**IN THE SUPREME COURT OF THE UNITED STATES**

**MANOHAR SURANA**
**PETITIONER**

**v.**

**UNITED STATES OF AMERICA**
**RESPONDENT**

**ON PETITION FOR A WRIT OF CERTIORARI TO COURT OF APPEAL FOR THE ELEVENTH CIRCUIT**

Petitioner Manohar Surana respectfully prays that a writ of certiorari issue in review of the judgement below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals is unpublished and is located at Appendix G Order Denying Certificate of Appealability; dated 3/31/03 and the United States Court of Appeals Panel denial of Certificate of Appealabilty, dated 5/19/03 is located at Appendix H. The final judgment of the District Court is found at Appendix C, and the District Court denial of Certificate of Appealability is found at Appendix E and F.

## JURISDICTION

The date on which the United States Court of Appeals decided this case was March 31, 2003. A copy of the order of dismissal by the United States Court of Appeals appears at Appendix G. A timely petition for rehearing was denied by the United States Court of Appeals on May 19, 2003 and a copy of the order denying rehearing appears at Appendix H. The jurisdiction of this Court is invoked under 28 U.S.C. 1251(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5
28 U.S.C. 1251(1)
28 U.S.C. 2253
28 U.S.C. 2255

## STATEMENT OF THE CASE

Surana moved this court for a grant of a Certificate of Appealability, pursuant to 28 U.S.C. 2253(a), (c)(1)(B), which was denied on March 31, 2003 (Appendix B). Surana is Petitioning this Honorable Court for a review of the denial of a Certificate of Appealability and avers that there are compelling and unusual circumstances by which this Court may grant his request for a Certificate of Appealability.

Surana claimed, in his Section 2255, that the breached inducement by the prosecutors in this case, as well as the ineffectiveness of counsel as to proper

legal advice and misrepresentation of the case and consequences of his plea meet the requirements of § 2253 to require a "certificate of appealability". Simply, Surana claims that, before accepting a plea of guilty or nolo contendere, the court failed to inform him of, and determine that he understands the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any supervised release term. *Federal Rules of Criminal Procedure* 11(c).

Surana claimed that the court did not determine that the plea was voluntary and not the result of promises apart from a plea agreement. The Court did not inquire whether the defendant's willingness to plead guilty resulted from prior discussions between the attorney for the government and the defendant or his attorney. Had the Court inquired, Surana would have claimed that the reason for his plea of guilt was, in fact, due to the promises of the government and his state of mind at the time of the hearing. Consequently the district court failed to adhere to the strictures of the statutes involved and Surana asserts that he is entitled to an evidentiary hearing as to the matters placed before the court. *Federal Rules of Criminal Procedure Rule* 11, *28 U.S.C 2255* Rule 8.

The court does not have the authority to accept either a plea of guilty or a plea of nolo contendere until the court had first determined that the defendant has a requisite understanding and that the plea is voluntary, in accordance with *Federal Rules of Criminal Procedure* 11(c) and (d). See *McCarthy v.*

*United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969). This, the District Court failed to do in this case to the prejudice of the Defendant.

Surana claims that he has made a substantial showing of the denial of a constitutional right," and has "indicate(d) which specific issue or issues satisfy the showing required" within the pleadings filed before this court. See former 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991); *Houchin v. Zvaras*, 924 F. Supp. 115 (D. Colo. 1996) (identifcation of specific issues). Surana has moved and been denied a merit review by the denial of a Certificate of Appealability.

## REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Eleventh Circuit should have issued a COA to review the District Court's denial of habeas relief to petitioner on the following basis:

Before a prisoner seeking post-conviction relief under 2255 may appeal a district court's denial or dismissal of the petition, he must first seek and obtain a COA from a circuit justice or judge, 28 U.S.C. 2253. This is a jurisdictional prerequisite. A COA will issue only if §2253's requirements have been satisfied. When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. E.g., *Slack*, 529 U. S., at 481. This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and

the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." §2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g., id., at 484. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, *ibid* pp. 11-13.

Where 28 U. S. C. 2255 applies, the Court's habeas jurisprudence embodies this deference. Factual determinations by district courts are presumed correct absent clear and convincing evidence to the contrary, §2255, and a decision adjudicated on the merits in a district court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the district-court proceeding, §2255. Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. *Miller-El v. Cockrell*, 529 U.S. 322 (2003).

Upon a review of the record at this stage, petitioner urges this Honorable Court to conclude that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the district court's evaluation of the government's case. The Eleventh Circuit evaluated petitioner's COA application in the same way. In

apparently ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Appellate Court simply acquiesced to the District Court who acquiesced to the government's response without further ado.

While the petitioner's motion evinced material facts in dispute, the District Court ignored same and apparently required clear and convincing evidence without an evidentiary hearing. This was too demanding a standard because it incorrectly merged the clear and convincing evidence standard, which pertains only to district-court determinations of factual issues, rather than decisions, and the unreasonableness requirement, which relates to the district-court decision and applies to the granting of habeas relief. More fundamentally, the court was incorrect in not inquiring whether a "substantial showing of the denial of a constitutional right" had been proved, as §2253(c)(2) requires. The question is the debatability of the underlying constitutional claim, not the resolution of that debate. *Miller-El v. Cockrell*, 529 U.S. 322 (2003).

The claim now arises in a federal petition for writ of habeas corpus. The procedures and standards applicable in the case are controlled by the habeas corpus statute codified at Title 28, chapter 153 of the United Districts Code, most recently amended in a substantial manner by the *Antiterrorism and Effective Death Penalty Act of 1996* (AEDPA). In the interest of finality AEDPA constrains a federal court's power to disturb district-court convictions.

The United States District Court for the Southern District of Florida determined that petitioner failed to establish a constitutional violation warranting habeas relief. The Court of Appeals for the Eleventh Circuit, concluding there was insufficient merit to the case, denied a certificate of appealability (COA) from the District Court's determination. The COA denial is the subject of this petition. At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. Congress mandates that a prisoner seeking postconviction relief under 28 U. S. C. §2255 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, petitioner must first seek and obtain a COA. In resolving this case it must be decided that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, whether the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U. S. 473, 481 (2000). Consistent with prior precedent and the text of the habeas corpus statute, petitioner asserts that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U. S. C. §2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell* 529 U.S. 322 (2003); *Slack* supra, at 484. Applying these principles to petitioner's application, we conclude a COA should have issued.

The petitioner makes several presumptions as to the decision by the Court of Appeals due to the fact that it merely adopted the decision of the District Court which proffered the governmental response as its decision: The Court of Appeals apparently assumed that, under controlling habeas principles, a COA will "'issue only if the applicant has made a substantial showing of the denial of a constitutional right.'" based on *Miller-El v. Johnson*, 261 F.3d 445, 449 (2001) (quoting 28 U. S. C. §2253(c)(2)). The petitioner claims that within the context of *Slack v. McDaniel*, 529 U. S. 473 (2000), "[a] petitioner makes a 'substantial showing' when he demonstrates that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." 261 F.3d, at 449. The Court of Appeals apparently acted on the basis of the presumed requirements of 28 U. S. C. 2255 into the COA determination by projecting that the district court findings correct unless determined that the findings result in a decision which is unreasonable in light of the evidence presented, and the unreasonableness, if any, must be established by clear and convincing evidence.

The petitioner presumes that the Court of Appeals, in applying this framework to petitioner's COA application, concluded that the district court's findings are not unreasonable and that petitioner has failed to present clear and convincing evidence to the contrary. As a consequence, the court determined that the district court's adjudication neither resulted in a decision that was unreasonable in light of the evidence

presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, and it denied petitioner's request for a COA.

As mandated by federal statute, a federal prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U. S. C. §2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. . . ." §2253(c)(1). As a result, until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U. S., at 482; *Hohn v. United Districts*, 524 U. S. 236, 248 (1998). As the Court of Appeals observed in this case, §2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack, supra* at 483, it has been recognized that Congress codified the judicial standard, announced in *Barefoot v. Estelle*, 463 U. S. 880 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether

(or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U. S., at 484 (quoting *Barefoot*, supra, at 893, n. 4).

The COA determination under 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. One must look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. To that end, the opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with §2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner " 'has already failed in that endeavor.' " *Barefoot, supra*, at 893, n. 4.

The petitioner does not claim that a COA always must issue. Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to district prisoners. *Duncan v. Walker*, 533 U. S. 167, 178 (2001) (" 'AEDPA's purpose [is] to further the principles of comity, finality, and federalism' ") (quoting *Williams v. Taylor*, 529 U. S. 420, 436(2000)); *Williams v. Taylor*, 529 U. S. 362, 399 (2000) (opinion of O'Connor, J.). By enacting AEDPA, using the specific standards the Court had elaborated earlier for the threshold test, Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not. It follows that issuance of a COA must not be pro forma or a matter of course.A prisoner seeking a COA must prove " 'something more than the absence of frivolity' " or the existence of mere "good faith" on his or her part. *Barefoot*, supra, at 893. In this case, the petitioner asserts that he has proffered such materials that initially meet this standard.

The petitioner is not required to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's

assessment of the constitutional claims debatable or wrong." 529 U. S., at 484.

The petitioner asserts that the COA inquiry asks only if the District Court's decision was debatable, and he claims that a threshold examination would convince a court that it was. On this basis, petitioner seeks relief.

## CONCLUSION

On the basis of the foregoing, the petition for a writ of certiorari should be granted.

ALVIN E. ENTIN, ESQ.
Counsel of Record

Entin, Margules, and Della Fera, P.A.
Autonation Tower Suite 1970
110 Southeast 6th Street
Fort Lauderdale, Florida 33301
Telephone (954) 761-7201
Facsimile (954) 767-8343

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**MANOHAR SURANA**
**PETITIONER**
**v.**
**UNITED STATES OF AMERICA**
**RESPONDENT**

## APPENDIX INDEX

**Appendix A** Docket for Surana v. United States #02-CV-22289 ..... App-1

**Appendix B** Complaint-Motion to withdraw Plea pursuant to 28 U.S.C. 2255 ..... App-11

**Appendix C** Order of Dismissal and Denying Motion to Withdraw Guilty Plea ..... App-50

**Appendix D** Surana Notice of Appeal and Request for Certificate Appealability ..... App-51

**Appendix E** Order Denying Certificate of Appealability ..... App-55

**Appendix F** Second Order Denying Certificate of Appealability ..... App-57

**Appendix G** USCA Order Denying Certificate of Appealability ..... App-59

**Appendix H** USCA Panel Order Denial Certificate of Appealabilty ..... App-60

**U.S. District Court**
**Southern District of Florida (Miami)**
**CIVIL DOCKET FOR CASE #: 02-CV-22289**
**Surana v. United States**
Filed: 07/31/02
Assigned to: Judge Paul C. Huck
Demand: $0,000
Nature of Suit: 510
Lead Docket: None
Jurisdiction: US Defendant
Dkt # in USDC/SFL : is 01-cr-1045-Huck
Cause: 28:2255 Motion to Vacate Sentence

MANOHAR SURANA
plaintiff
v.
UNITED STATES OF AMERICA
defendant

David Raben
FTS 858-7491
305-858-9550
[COR LD NTC]
Robbins Tunkey Ross Amsel Raben et a1
2250 SW 3rd Avenue
4th Floor
Miami, FL 33129-2095
305-858-9550
Eric A. Dubelier
FTS 414-9299
202-414-9291
[COR LD NTC]
Donna M. Sheinbach
FTS 414-9299
[COR LD NTC]

Reed Smith
1301 K Street, NW
Suite 1100 East Tower
Washington, DC 20005
202-414-9200
Nancy Luque
202-887-4777
Suite 857
[COR LD NTC]
818 Connecticut Avenue, NW
Washington, DC 20006
Michael J. Mullaney
FTS 536-4675
305-961-9290
[COR LD NTC]
United State's Attorney's Office
99 NE 4th Street
Miami, FL 33132
305-961-9000

**DOCKET PROCEEDINGS**
**Position the cursor on the Img Icon to view the Image Display Cost.**

| DATE | # | Img | DOCKET ENTRY |
|---|---|---|---|
| 7/31/02 | 1 | ⊠ | COMPLAINT/AMENDED MOTION to vacate sentence (2255) filed; FILING FEE: Waived; Magistrate Judge William C. Turnoff (lk) [Entry date 08/01/02] |
| 7/31/02 | -- | | The criminal case 00-cr-1045- Huck has been scanned and the date it was done. (lk) [Entry date 08/01/02] [Edit date 08/20/02] |

| | | | |
|---|---|---|---|
| 8/16/02 | 2 | ⊠ | ORDER Requring Response setting response to motion to withdraw guilty plea due for 8/30/02 for United States (Signed by Judge Paul C. Huck on 08/16/02) [EOD Date: 8/19/02] (nt) [Entry date 08/19/02] |
| 8/30/02 | 3 | ⊠ | RESPONSE by United States to motion under 28 USC 2255(cj) [Entry date 09/04/02] |
| 9/11/02 | 4 | ⊠ | WRIT of Habeas Corpus ad testificandum (Siqned by Judqe Paul C. Huck on 09/11/02) [EOD Date: 9/12/02] CCAP (nt) [Entry date 09/12/02] |
| 9/11/02 | 5 | ⊠ | NOTICE of Hearing: Set Jury trial for 9:00 10/2/02 before Judge Paul C. Huck, Set calendar call for 8:30 10/3/02 before Judge Paul C. Huck (ra) [Entry date 09/12/02] |
| 9/12/02 | 6 | ⊠ | REPLY by Manohar Surana to [3-1] 2255 motion response (nt) [Entry date 09/13/02] |
| 9/13/02 | 7 | ⊠ | CORRECTED SCHEDULING NOTICE of Hearing: setting Jury trial for 9:00 10/7/02 before Judge Paul C. Huck, setting calendar call for 8:30 10/2/02 before Judge Paul C. Huck (nt) [Entry date 09/16/02] |

| | | | |
|---|---|---|---|
| 9/17/02 | 8 | ⊠ | EMERGENCY MOTION by Manohar Surana for continuance of 2255 hearing, and for Temporary Release under 18 USC 3622 (nt) [Entry date 09/18/02] |
| 9/23/02 | 9 | ⊠ | ORDER granting [8-1] motion for continuance of 2255 hearing; denying [8-2] motion for Temporary Release under 18 USC 3622 reset Jury trial for 10/15/02 before Judge Paul C. Huck, reset calendar call for 8:30 10/9/02 before Paul C. Huck (Signed by Judge Paul C. Huck on 9/20/02) [EOD Date: 9/24/02] (gz) [Entry date 09/24/02] |
| 9/24/02 | 10 | ⊠ | MOTION by Manohar Surana for Nancy Luque to appear pro hac vice (nt) [Entry date 09/25/02] |
| 9/24/02 | -- | | Pro Hac Vice Fee Paid; FILING FEE $ 75.00 RECEIPT # 220368 (nt) [Entry date 09/25/02] |
| 9/24/02 | 11 | ⊠ | ORDER granting [10-1] motion for Nancy Luque to appear pro hac vice (Signed by Judge Paul C. Huck on 09/24/02) [EOD Date: 9/25/02] (nt) [Entry date 09/25/02] |
| 9/27/02 | 12 | ⊠ | SECOND MOTION by Manohar Surana to continue ance of section 2255 hearig (1s) [Entry date 09/30/02] |

| | | | |
|---|---|---|---|
| 10/7/02 | 13 | ⊠ | ORDER denying [12-1] motion to continuance of section 2255 hearing. - Hearing set for week of 10/14/02. setting calendar call for 8:30 10/9/02 before Judge Paul C. Huck (Signed by Judge Paul C. Huck on 10/07/02) [EOD Date: 10/8/02] (nt) [Entry date 10/08/02] |
| 10/15/02 | 14 | ⊠ | MOTION by Manohar Surana to compel subpoenaed documents (nt) [Entry date 10/16/02] |
| 10/16/02 | 15 | ⊠ | BENCH MEMORANDUM on the "Missing Witness" Inference by Manohar Surana (nt) [Entry date 10/17/02] |
| 10/16/02 | 16 | ⊠ | MOTION by Manohar Surana for Eric A. Dubelier to appear pro hac vice (lk) [Entry date 10/17/02] |
| 10/16/02 | -- | | Filing Fee Paid; FILING FEE $75.00 RECEIPT # 871016 (lk) [Entry date 10/17/02] |
| 10/17/02 | 17 | ⊠ | ORDER granting [16-1] motion for Eric A. Dubelier to appear pro hac vice (Signed by Judge Paul C. Huck on 10/16/02) [EOD Date: 10/18/02] (nt) [Entry date 10/18/02] |
| 10/23/02 | 18 | ⊠ | Submission of Proposed Findings of Fact and Conclusions of Law by United States (nt) [Entry date 10/24/02] |

| | | | |
|---|---|---|---|
| 10/23/02 | 19 | ⊠ | Proposed Findings of Fact and Conclusions of Law by Manohar Surana (nt) [Entry date 10/24/02] |
| 10/28/02 | 20 | ⊠ | ORDER OF DISMISSAL (Signed by Judge Paul C. Huck on) [EOD Date: 10/30/02] (ra) [Entry date 10/30/02] |
| 10/29/02 | -- | | CASE CLOSED. Case and Motions no longer referred to Magistrate. (ra) [Entry date 10/30/02] |
| 12/11/02 | 21 | ⊠ | NOTICE OF APPEAL by Manohar Surana of [20-1] order EOD Date: 10/30/02; Filing Fee: $ 105.00; Receipt #: 873971 Copies to USCA and Counsel of Record. (hh) |
| 12/11/02 | 21 | ⊠ | MOTION by Manohar Surana for certificate of appealability (hh) |
| 12/11/02 | -- | | Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [21-1] appeal by Manohar Surana (hh) |
| 12/13/02 | 22 | ⊠ | ORDER denying [21-1] motion for certificate of appealability (Signed by Judge Paul C. Huck on 12/13/02) [EOD Date: 12/18/02] (nc) [Entry date 12/18/02] |
| 12/20/02 | -- | | NOTICE of Receipt of Notice of Appeal Transmittal Letter from USCA on 12/13/02 as to Manohar Surana Re: [21-1] appeal by Manohar Surana USCA NUMBER: 02-16743-I (nc) |

| | | | |
|---|---|---|---|
| 12/23/02 | 23 | ⊠ | Acknowledgement of Transcript Information Formas to Manohar Surana re: [21-1] appeal by Manohar Surana Transcript of: habeas petition hearing held 10/14-15/02 Transcript due on: 1/23/03 for Manohar Surana; Court Reporter name: Patricia Sanders (ga) [Entry date 12/26/02] |
| 1/22/03 | 24 | ⊠ | AMENDED NOTICE OF APPEAL by Manohar Surana of [22-1] order EOD Date 12/18/02, [20-1] order EOD Date: 10/30/02; Filing Fee: $ (FEE NOT REQUIRED AMENDED); Copies to USCA and Counsel of Record. (hh) [Entry date 01/23/03] |
| 1/22/03 | 24 | ⊠ | MOTION by Manohar Surana for reconsideration of [22-1] order (hh) [Entry date 01/23/03] |
| 1/23/03 | -- | | Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [24-1] appeal by Manohar Surana (hh) |
| 1/24/03 | 25 | ⊠ | TRANSCRIPT filed as to Manohar Surana of proceedings held 10/15/02 before Judge Paul C. Huck Pages: 1-97 re: [24-1] appeal by Manohar Surana, [21-1] appeal by Manohar Surana . . (ga) [Entry date 01/27/03] |

| | | | |
|---|---|---|---|
| 1/24/03 | 26 | ⊠ | TRANSCRIPT filed as to Manohar Surana of proceedings held 10/16/02 before Judge Paul C. Huck Pages: 1-188 re: [24-1] appeal by Manohar Surana, [21-1] appeal by Manohar Surana . . (ga) [Entry date 01/27/03] |
| 1/24/03 | 27 | ⊠ | TRANSCRIPT filed as to Manohar Surana of proceedings held 10/25/02 before Judge Paul C. Huck Pages: 1-23 re: [24-1] appeal by Manohar Surana, [21-1] appeal by Manohar Surana . . (ga) [Entry date 01/27/03] |
| 1/24/03 | 28 | ⊠ | Transcript Information Form for Transcript of: habeas corpus petition held 10/14-15/02 filed re: [24-1] appeal by Manohar Surana (ga) [Entry date 01/28/03] |
| 1/24/03 | 29 | ⊠ | ORDER denying [24-1] motion for reconsideration of [22-1] order (Signed by Judge Paul C. Huck on 1/23/03) [EOD Date: 1/28/03] (hh) [Entry date 01/28/03] |
| 1/28/03 | 30 | ⊠ | Transcript Information Form re: as to Manohar Surana [24-1] appeal by Manohar Surana. No transcript requested. (ga) [Entry date 01/29/03] |
| 1/29/03 | 31 | ⊠ | Transcript Information Form re: as to Manohar Surana [24-1] appeal by Manohar Surana, [21-1] appeal by Manohar Surana. No transcript requested. (ga) [Entry date 01/30/03] |

| | | | |
|---|---|---|---|
| 2/14/03 | -- | | REQUEST from U.S.C.A. dated: 2/7/03 Re: Original Papers (Atlanta Office/Pamela Allen) Consisting of (1) Volume of Pleadings, (1) Expansion Folder and Criminal Case # 00-1045-CR consisting of (1) Volume of Pleadings and (1) Expansion Folder Complied with on: 2/14/03 U.S.C.A. # 02-16743-I (hh) |
| 3/3/03 | -- | | ACKNOWLEDGMENT of receipt by U.S.C.A. of: Original Papers on 2/24/03; U.S.C.A. # 02-16743-I (hh) |
| 3/31/03 | 32 | ⊠ | ORDER of dismissal from USCA (certified copy) denying [24-1] appeal, denying [21-1] appeal pursuant to appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. USCA # : 02-16743-I USCA Order Date: 3/27/03 (hh) [Entry date 04/01/03] |
| 3/31/03 | -- | | Record on appeal as to Manohar Surana returned from U.S. Court of Appeals: (Miami/Records) Consisting of (1) Volume of Pleadings, (1) Expansion Folder and Criminal Case # 00-1045-CR consisting of (1) Expansion Folder [24-1] appeal [21-1] appeal USCA # : 02-16743-I (hh) [Entry date 04/01/03] |

| | | |
|---|---|---|
| 5/19/03 | -- | USCA Case Number as to Manohar Surana USCA NUMBER: 02-16743-I In Re: Appellant has filed a "Petition for Panel Rehearing for a Grant of Certificate of Appealability," which is construed as a motion for reconsideration of this Court's order dated March 27, 2003. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. (hh) |

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**

02-22289
[Date Stamp]

**MANOHAR SURANA,**
**Plaintiff,**

**Case No.:_____**

**v.**

CIV - HUCK

**UNITED STATES OF AMERICA,**
**Defendant.**

MAGISTRATE JUDGE
TURNOFF

**AMENDED**
**MOTION TO WITHDRAW GUILTY PLEA**

Manohar Surana, by and through undersigned counsel, hereby brings this Motion to withdraw his plea of guilty, and for resentencing pursuant to 28 U.S.C. § 2255. Mr. Surana was induced by the prosecutors' breached agreements to plead guilty, and because counsel did not properly advise him regarding his remedy, he entered a plea to conspiring to commit extortion, bribery, and money laundering when the facts did not support such plea. The prosecutor's factual proffer was inaccurate and, again, because Mr. Surana was not advised properly by counsel as to his remedy, the prosecutors' breach of the agreements and the fraud on this court warrant withdrawal of Mr. Surana's plea or, at least, partial withdrawal and reconsideration of his sentence.

Mr. Surana requests an evidentiary hearing on this Motion pursuant to Section 2255, which states that he is entitled to a prompt hearing unless the motion, files,

and records of the case conclusively show that no relief is warranted. 28 U.S.C. § 2255. Mr. Surana also requests that he be released to house arrest with electronic monitoring or to a halfway house immediately pending determination of this Motion. In light of his time already served, and because denial of such relief could leave him without a remedy should this Motion be granted, Mr. Surana requests such relief because he will be eligible to serve the remainder of his sentence at a halfway house on July 23, 2002 pursuant to Bureau of Prisons regulations.

## STATEMENT OF FACTS

Mr. Surana is a United States citizen, fifty-seven years old, who is currently confined following a plea of guilty to one count of a four-count indictment for conspiracy to commit bribery, extortion, and money laundering in violation of 18 U.S.C. § 371. He was sentenced based on the applicable offense level for the substantive crime of money laundering because this offense produced the highest offense level. *See* U.S.S.G. § 3D1.3(a). The money laundering offense increased Mr. Surana's base offense level by thirteen levels.[1]

Mr. Surana was sentenced to fourteen months incarceration, a fine of $40,000, supervised release for a period of three years, and 3000 hours of community service. *See* Judgment and Conviction Order dated October 25, 2001, attached as Exhibit "A." Mr. Surana did

---

[1] Mr. Surana was sentenced pursuant to a base offense level of 23 for the money laundering offense, versus 10, which is the base offense level for bribery/extortion. *Compare* U.S.S.G. § 2S1.1, *with* U.S.S.G. § 2C1.1. *See also infra* Part III (explaining why Mr. Surana's sentence was not correctly calculated.)

not testify at his hearing and did not appeal the judgment of conviction.[2]

Prior to the events described below, Mr. Surana worked for the City of Miami ("City") for over twenty years, most recently as Finance Director and Assistant City Manager. Because of his long-term employment with the City, he had become eligible for retirement and a pension, but the City took away his rights to these benefits following his plea. Mr. Surana brings this Motion in light of the government's conduct and the ineffectiveness of his counsel, described below, which violated his constitutional rights and resulted in a fraud on the court.

### 1. The March 4 Cooperation Agreement

On March 4, 1996, the Federal Bureau of Investigation ("FBI") stopped Mr. Surana at a roadblock in downtown Miami, Florida and took him to a FBI office in North Miami for questioning. Mr. Surana was not advised of his rights – although his detention clearly was custodial – and the FBI and prosecutors questioned him for hours before the Assistant United States Attorneys ("AUSAs"), Marty Goldberg and Mary Butler, called a lawyer, Mr. Robert Josefsberg, to assist him.[3]

Mr. Surana was one of the officials in charge of negotiating contracts for the City, and the FBI was interested in his dealings with various people and

---

[2] Mr. Surana's attorney, Steven E. Chaykin, advised Mr. Surana not to appeal.

[3] Clearly, the AUSAs should not have been the ones to decide who Mr. Surana's counsel was going to be, and by calling Mr. Josefsberg, created the appearance of a conflict of interest. *See infra* Part III.A.

organizations. After being threatened with prosecution, Mr. Surana entered into an agreement to cooperate with the government in an investigation and undercover operation being conducted by the United States Attorney's Office ("USAO"). *See* Letter Agreement, dated March 4,1996, attached as Exhibit "B" ("March 4 Agreement") (granting Mr. Surana direct use and derivative immunity from prosecution). Mr. Surana's counsel was not present when he negotiated the March 4 Agreement with FBI Agent Keith Bryars and AUSAs Goldberg and Butler.

In exchange for providing the government with information in connection with their investigation of other high level officials and significant future cooperation, the government promised that no statements made by him or his son, Pamit Surana, would be used against the other and that Pamit would not be prosecuted. *See id.* at ¶6. Mr. Surana's promise to cooperate included his agreement to work in an undercover capacity, which obviously put him and his family in significant jeopardy. The government further promised that it would allow Mr. Surana time to convert his 401(k) pension plan to the City Pension Plan before the investigation concluded; thereby preserving the benefits he had earned from his service to the City for over twenty years.[4] The government agreed that any charges brought would be based on the level of his

---

[4] AUSAs Goldberg and Butler also agreed to allow Mr. Surana three to four weeks to resolve his insurance benefit payments if he agreed to resign. Because the government's investigation was exposed prematurely due to its own error, however, Mr. Surana could not work out his benefit payments before he was forced to resign. Thus, Mr. Surana lost his then current level of City and survivor's benefits which included life insurance for life, health insurance for life with survivor's benefits, and severance pay, valued at $350,000.

cooperation, with the understanding that the more information he produced, the more lenient the prosecutors would be with any charges. The government also agreed to support no jail time at sentencing.

The government recognized Mr. Surana's desire to protect his family, and promised that he, through his involvement in their investigation, would be a "hero" in the public eye. In reliance on the March 4 Agreement and, specifically, government promises that it would be lenient in the charges brought against him and secure his pension, Mr. Surana, at significant personal risk, continued to cooperate with the government. From March through August 1996, Mr. Surana worked undercover. He wore a wire, putting himself and his family in great danger, and in so doing, caught four City officials committing crimes on tape.[5] Mr. Surana also advised the USAO of criminal schemes that they knew nothing about.

---

[5] Mr. Surana's cooperation resulted in the six-count indictment of former City Manager, Cesar Odio, and lobbyist, Jorge De Cardenas. Mr. Odio pled guilty to one count of a superceding indictment for tampering with a witness/informant in violation of 18 U.S.C. §§ 1512(b)(3) and 2 and was sentenced to 12 months imprisonment and 2 years supervised release. Mr. De Cardenas pled guilty to one count of a superceding indictment charging him with obstruction of justice in violation of 18 U.S.C. § 1503 and was sentenced to 12 months imprisonment, 3 years supervised release and $3,000 restitution.

Mr. Surana's cooperation also resulted in a guilty plea by Miller Dawkins, a City commissioner, to conspiracy to commit theft and bribery in violation of 18 U.S.C. § 371. A fourth individual, Howard Gary, caught on tape as a result of Mr. Surana's cooperation, became an informant like Mr. Surana and his cooperation resulted in charges against an ex-County Commissioner, his former aide, and a bond dealer. Mr. Gary was never charged, even though he cooperated less than Mr. Surana. All of the targets in the government's investigation served jail time or cooperated as a result of Mr. Surana's involvement.

## 2. The June 1996 Plea Apreement

On June 19, 1996, the government presented Mr. Surana with a plea agreement ("June 1996 Plea Agreement," attached as Exhibit "C"), which it had negotiated with Mr. Josefsberg, Mr. Surana's government-provided counsel, and which Mr. Josefsberg had signed without Mr. Surana's knowledge or consent. Mr. Josefsberg was not present when Mr. Surana attempted to negotiate the June 1996 Plea Agreement with the government for over four hours, nor did Mr. Josefsberg discuss the agreement or its relationship with the March 4 Agreement with him.[6]

By and through the June 1996 Plea Agreement, Mr. Surana agreed to plead guilty to conspiracy to commit bribery and extortion in violation of 18 U.S.C. § 371. When he asked AUSAs Goldberg and Butler to put the promises they had made on March 4 and subsequently in writing, they stated that putting these promises in writing would make their case against him weaker, but said "trust us, we will take care of you, you are doing the right thing."

Consistent with his belief in the government's oral promises, Mr. Surana followed AUSAs Goldberg's and Butler's advice, and further trusted them and specifically FBI Agents Bryars and Gary Favita, when they advised him to convert his protected 401 (k) pension plan to the City's unprotected pension plan. Because Mr. Surana believed that the agents and prosecutors would honor their promises to him to protect his pension benefits, he agreed to transfer the money in his 401(k) to the City's pension fund on or about June 19, 1996. The USAO and

---

[6] *See infra* Part III.A (regarding Josefsberg's ineffective assistance of counsel).

the FBI *knew* that this conversion would subject Mr. Surana's lifelong earnings to forfeiture.[7]

After he signed the June 1996 Plea Agreement, Mr. Surana continued to cooperate, relying on the government's oral promises. Even at great risk, after the government's investigation was thwarted due to its own mishandling, and one of the targets of its investigation learned that he had been set up, Mr. Surana agreed again to wear a wire at the government's suggestion and met with the revealed target. The government knew at the time that they asked Mr. Surana to meet with the target that the target was suspicious. In fact, the target asked Mr. Surana when they met if he was wearing a wire. This tape became significant evidence to support a conspiracy to obstruct justice charge against this individual.

On August 30, 1996, AUSAs Goldberg and Butler, and FBI Agents Bryars and Favita, asked Mr. Surana to resign from his position as Finance Director and Assistant City Manager. Mr. Surana agreed, believing his pension was secure. He also cooperated further, pursuant to the June 1996 Plea Agreement, by returning $25,000 in finds that had been laundered through the Bahamas to a foreign bank account in connection with a FBI sting investigation on or about December 31, 1996. *See* Letter to M. Butler from W. Aaron, dated December 31, 1996, attached as Exhibit "D."

On August 7, 1998, the government submitted to Mr. Surana a criminal Information and waiver of indictment form to execute. *See* Letter from T. Scott to W.

---

[7] Under Florida law, a guilty plea to a charge that would be a felony under Florida law forfeits the defendant's rights to his pension benefits for the remainder of his life and the life of his spouse. Fl. Stat. Ann. § 112.3173 (West 2002).

Aaron and Information, dated August 7, 1998, attached as Exhibit "E." The USAO, through AUSA Edward C. Nucci, proposed that Mr. Surana sign the waiver of indictment in order that they could "file the Information for a plea" sometime after August 19, 1998. *Id.* (facsimile from E. Nucci to R. Josefsberg). The Information charged Mr. Surana with conspiracy to commit bribery and extortion in violation of 18 U.S.C. § 371. *See id.*

Although Mr. Josefsberg had told the USAO that Mr. Surana would agree to their proposal without discussing it with his client; in fact, Mr. Surana did not believe that the Information was consistent with the terms of the March 4 Agreement, the oral understandings surrounding that agreement, or the June 1996 Plea Agreement. Thus, Mr. Surana hired new counsel, Mr. Steven E. Chaykin, who informed the government on January 25, 1999 that Mr. Surana would not plead guilty to the Information.[8] *See* Letter to E. Nucci from S. Chaykin, dated January 25, 1999, attached as Exhibit "F."

The government terminated the March 4 Agreement, which "cancelled" Mr. Surana's immunity, and the June 1996 Plea Agreement, claiming that Mr. Surana had breached the June 1996 Plea Agreement by refusing to plead guilty. *See* Letter to S. Chaykin from T. Lindsey, dated February 26, 1999, attached as Exhibit "G." After it "terminated" the immunity agreement, it then turned its eye towards indicting Mr. Surana *and his son,* in clear violation of the original cooperation agreement, even though Mr. Surana had cooperated fully and at significant risk for the preceding three years.

---

[8] Mr. Surana refused to sign the waiver of indictment because he was advised that to do so would forfeit his pension.

## 2. Indictment

As a result of several subsequent conferences with the USAO, Mr. Surana was invited to make a pre-indictment presentation to Mr. James Robinson, Assistant Attorney General. On September 13, 2000, Mr. Chaykin wrote to Mr. Robinson outlining his objections to the USAO's threats to indict Mr. Surana and his son, Pamit. *See* Letter to J. Robinson from S. Chaykin, dated September 13, 2000, attached as Exhibit "H." Through this letter, Mr. Surana again reiterated the promises made by the government from March 4 forward that his pension benefits would be protected and Pamit would not be indicted.[9]

Then, with no warning, Mr. Surana and his son, Parnit, were indicted by a grand jury on November 30, 2000, in direct violation of the March 4 Agreement and the oral understandings with respect to same, and the oral understandings with respect to the June 1996 Plea Agreement. *See* Indictment, dated November 30, 2000, attached as Exhibit "I." The four-count indictment charged (1) conspiracy to commit extortion, bribery. and money laundering in violation of 18 U.S.C. § 371; (2) extortion in violation of 18 U.S.C. § 1951; (3) bribery in violation of 18 U.S.C. § 666; and (4) money laundering in violation of 18 U.S.C. § 1956.

---

[9] Mr. Chaykin also was aware that the government would never be able to prosecute Mr. Surana or his son because there would be no way that the government could withstand a *Kastigar* hearing. *See Kastigar v. United States*, 406 U.S. 441 (1972). Mr. Surana had provided so much information to the government that it would have been impossible for the government to present a case against Mr. Surana that arose from evidence completely independent of his immunized statements.

The indictment named Mr. Surana's son, Pamit, as a party, and also included conspiracy to commit money laundering and a substantive count of money laundering under 18 U.S.C. §§ 1956 and 371 for the first time, which insured that Mr. Surana would lose his pension and that he would go to jail.[10] Thus, the government broke each and every promise it made to Mr. Surana on March 4, 1996.

### 3. The Plea Agreement and Factual Proffer

Believing there was no other way to protect his son from prosecution, Mr. Surana agreed on May 18, 2001 to plead guilty to count one of the indictment, which charged conspiracy to commit extortion, bribery, and money laundering in violation of 18 U.S.C. § 371. *See* Plea Agreement, filed August 6, 2001 ("August 2001 Plea Agreement"), attached as Exhibit "J." Thereafter, beginning on June 14, 2001 with a letter from the government, the parties tried to agree on the facts. *See* Letter to S. Chaykin from F. Tarnen, dated June 14, 2001, attached as Exhibit "K."

Among other things, Mr. Surana took exception to the government's suggested language regarding the money laundering objective. Mr. Surana objected to these facts in particular because they were inaccurate and he proposed corrections. The government viewed Mr. Surana's refusal to agree to the "factual proffer" as a stalling tactic, and directed him to sign the proffer no later than June 26, 2001. If he refused, the government stated that the August 2001 Plea Agreement would be

---

[10] The money laundering count alone, whether calculated based on a conspiracy conviction or the substantive offense, puts the base offense level at 20 or 23 to start, which, even with no criminal history, results in a sentence between 33 and 57 months. *See* U.S.S.G. §§ 2S1.1; 2Xl.l; and Sentencing Table.

withdrawn. *See* Letter to S. Chaykin from F. Tamen, dated June 21, 2001, attached as Exhibit "L."

Under duress and not having been advised of his potential remedy for the government's breach of its agreement, Mr. Surana signed the inaccurate factual proffer on June 26, 2001. He did so upon the government's assertion that the proffer would only be used against him if he did not go forward with a plea. *See* Letter to S. Chaykin from M. Surana, dated June 26, 2001, attached as Exhibit "M"; Letter to F. Tamen from S. Chaykin, dated June 27, 2001, attached as Exhibit "N" (recalling, in Mr. Tamen's words, that it would be as if the factual proffer had "disappeared" if Mr. Surana entered a plea of guilty and complied with the terms of the August 2001 plea agreement).

From his discussions with his counsel and the government, Mr. Surana believed that the version of the facts set forth in the proffer could not be used against him in any way if he pled guilty. *See* Letter to S. Chaykin from M. Surana (Exhibit M) at ¶ 3 ("I sign this with the clear understanding that [the government] will further refine the facts in the Proffer for the purpose of filing [ ] the Plea... [S]pecifically Paragraph 6,7, or 10 [ ] cannot be used against me as long as I enter my guilty plea.").[11]

On August 6, 2001, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, a hearing was held in this Court ("Rule 11 hearing") at which Mr. Surana pled guilty. At the Rule 11 hearing, the government proffered, *inter alia,* the following facts:

---

[11] Paragraphs 6, 7, and 10 of the August 2001 Plea Agreement deal with the government's right to rebut facts raised by the court, the probation office, or the defendant in connection with the offenses committed.

> Government officials used this opportunity to introduce an undercover FBI agent to meet with him. This undercover FBI agent said off shore accounts could be used as a conduit. This undercover agent had a meeting with Mr. Surana and gave a detailed explanation of how Unisys Corporation could be set up in the Bahamas, where they could open a bank account in the Bahamas and the money could be paid in the bank account.
>
> Because of the financial privacy laws of the Bahamas the agent explained to Mr. Surana investigators from the United States would not be able to determine the source or origin of the money, therefore the account in the Bahamas would offer considerable advantages in terms of maintaining the secrecy of their financial dealings.
>
> In January/February of 1996, Mr. Surana agreed to have the first payment of $25,000 transferred from the United States through the Bahamas to an account in a bank in India. Mr. Surana had business contacts in India and wanted the money to go there before its eventual distribution.
>
> The FBI provided $25,000 in Government funds that was transferred in accordance with the plan Mr. Surana had discussed.

*See* Transcript of Plea Taken 8-6-01, at 15-17, attached as Exhibit "O."

The above facts proffered by the government to this Court on August 6, 2001 are inaccurate. Mr. Surana told his counsel they were inaccurate and that he would not agree to them; and the government was advised that they were not accurate and that Mr. Surana would not agree to them. Further, Mr. Surana never had the meeting the prosecutor described to the court on August 6.[12]

## ARGUMENT

### I. THE GOVERNMENT BREACHED THE MARCH 4 AGREEMENT

A plea may be set aside after sentencing only on direct appeal or by motion under 28 U.S.C. § 2255. Fed. R. Crim. P. 32(e). Under 28 U.S.C. § 2255, a prisoner in custody may collaterally attack a guilty plea if it was induced by an unkept promise by the prosecution. *See Santobello v. New York,* 404 U.S. 257, 262-63 (1971); *San Pedro v. United States,* 79 F.3d 1065, 1068 (11 th Cir. 1996). When a bargaining agreement is breached, the remedy should be specific performance of the agreement or the opportunity to withdraw the plea of guilty. *See Santobello,* 404 U.S. at 263.

The Eleventh Circuit enforces oral promises made in connection with plea agreements where the guilty plea "'rest[s] in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration.'" *See, e.g., In re Arnett,* 804 F.2d 1200, 1202 (11th Cir. 1986), quoting *Santobello,* 404 U.S. at 262. Where "the government's

---

[12] These facts are wholly inconsistent with the facts outlined in the indictment with regard to Mr. Surana's involvement. *See* Indictment (Exhibit I) at ¶¶ 11-18.

actions are inconsistent with what the defendant reasonably understood when he entered his guilty plea," the government's promise must be fulfilled. *Id.* at 1202-03, citing *Johnson v. Beto,* 466 F.2d 478,480 (5th Cir. 1972); *United States v. Crusco,* 536 F.2d 21, 27 (3d Cir. 1976).

When Mr. Surana was questioned initially on March 4, 1996, he bargained with the prosecutors for the protection of his son and his pension benefits in exchange for his extensive cooperation. The government agreed, and granted him immunity for the information and assistance he would provide to their undercover investigation. March 4 Agreement (Exhibit B) at ¶¶ 1-5. From March 4, 1996 forward, Mr. Surana complied fully with the government's investigation and provided substantial assistance, which resulted in the conviction of two high-profile city commissioners.[13] He continued to assist the investigators in reliance on the promises made in connection with his March 4 Agreement, even after he was shamed publicly in press articles revealing that he was an informant.

The March 4 Agreement did not state any specific offenses that Mr. Surana might be charged with, and it could be implied from the letter agreement that Mr. Surana would not be charged with any substantive offense if he provided significant information, which he did. *See* March 4 Agreement (Exhibit B) at ¶ 7 (noting that "the government will evaluate the information and assistance offered by Mr. Surana to determine an appropriate resolution to the charges which will be brought against him"). Moreover, the AUSAs and agents explicitly and repeatedly told Mr. Surana that he would not lose his pension and that his son would not be

---

[13] *See supra* note 5.

prosecuted if he cooperated, and they did so in front of a witness.

In spite of Mr. Surana's extensive cooperation, however, the government breached the March 4 Agreement by withdrawing his immunity when Mr. Surana would not plead guilty to charges that violated their oral understandings. Because Mr. Surana's attorneys told him that there would necessarily be a forfeiture of his pension if he pled guilty to conspiracy to commit extortion and bribery under Florida law, he refused to enter a plea that would free the government from their obligation under their bargain. But the government persisted by presenting Mr. Surana with the indictment, and Mr. Surana felt compelled to agree to a plea because he thought it was the only way to protect his son, Pamit. By agreeing to plea, Mr. Surana felt that he could mitigate his damages as a result of the prosecutors' breach by *at least* protecting his son. Thus, when Mr. Surana pleaded guilty on August 6, 2001, it was in violation of his constitutional rights. *See Santobello,* 404 U.S. at 1068; *San Pedro,* 79 F.3d at 1068.

### A. Promises Made During Plea Negotiations Are Enforceable

As the Eleventh Circuit stated recently in *San Pedro v. United States,* two conditions generally must be satisfied to show that the government breached a promise made during negotiations. *San Pedro,* 79 F.3d at 1068. "First, the agent making the promise must be authorized to do so, and second, the defendant must detrimentally rely on the promise." *Id.* (internal citations omitted). "In other words, to enforce a promise made during plea negotiations, there must have been a valid, binding agreement... upon which the defendant relied in deciding

to forego his constitutional rights and plead guilty." *Id.* (internal citations omitted).

As in *San Pedro,* Mr. Surana does not question the voluntariness of his guilty plea; rather, "he seeks to enforce a promise made during plea negotiations." *Id.* There is no question that the March 4 Agreement was binding on the government. There was a bargained-for exchange and the AUSAs who negotiated the agreement had the authority to act on the government's behalf. That the government attempted to force a plea in violation of that bargain, when it knew or should have known that a plea to a felony charge would implicate Mr. Surana's pension, clearly violated that agreement. Furthermore, the government should not have been permitted to withdraw the March 4 Agreement *after* Mr. Surana had fully performed and detrimentally relied on the terms of that agreement. *Cf. United States v. Hedges,* 912 F.2d 1397, 1403-05 (11th Cir. 1990) (finding that detrimental reliance on oral advice can give rise to an equitable estoppel defense). When Mr. Surana protested, the government should have honored its promises. Instead, it sought an indictment for him and his son that *charged an additional offense,* which was clearly retaliatory and punitive, in addition to being a violation of the original agreement between the parties.

The prosecutors had no additional evidence that would support any new charges against Mr. Surana since the ones they alleged in the June 1996 Plea Agreement and criminal Information. Yet the indictment alleged a substantive count of money laundering and a conspiracy to commit money laundering charge. Probing the facts shows that there are none that would support a money laundering objective; the prosecutors essentially concocted such facts to induce Mr. Surana to enter a plea. The government gambled that Mr. Surana would agree to

its scare tactics because it knew that the true facts that would support a money laundering charge would implicate his son, Pamit, and protection of his son was his foremost concern.

The remedy for a prosecutor's breach of the plea agreement is within the sound discretion of the Court. *United States v. Tobon-Hernandez,* 845 F.2d 277, 280-81 (11th Cir. 1988); *United States v. Nelson,* 837 F.2d 1519, 1525 (11th Cir. 1988); *In Re Arnett,* 804 F.2d at 1204. In *Santobello,* the Supreme Court outlined two possible remedies for defendants whose plea agreements have been violated. *Santobello,* 404 U.S. at 263. One remedy is to permit the defendant the opportunity to withdraw his plea of guilty. *Id.* Clearly, the facts above support this remedy for Mr. Surana based on the prosecutors' breach of the March 4 Agreement and their misconduct. *Id.; Tobon-Hernandez,* 845 F.2d at 280. To deny Mr. Surana this remedy, when his lawyers never told him that the prosecutors were bound by their oral agreements,[11] would be a clear violation of Mr. Surana's rights.

## II. IF NOT ENTITLED TO WITHDRAW HIS PLEA, SURANA SHOULD BE ENTITLED TO SPECIFIC PERFORMANCE OF THE MARCH 4 AGREEMENT

The second remedy envisioned by the Supreme Court for a prosecutor's breach of a plea agreement is specific performance of that agreement with resentencing by an alternate judge. *Santobello,* 404 US. at 263. In Mr. Surana's case, not only did the prosecutors breach the original agreement between the parties to protect his son, his pension, and his fieedom (by recommending no jail

---

[11] *See infra* Part III (regarding ineffective assistance of counsel).

time), but when it put the charges before the grand jury, it alleged a new offense, not mentioned previously in any discussions between the parties. Because Mr. Surana never agreed to plead guilty to a charge of money laundering, or conspiracy to commit money laundering, and the facts upon which these charges were based were inaccurate, the money laundering objective should be withdrawn from his plea and he should be resentenced on that basis.

### A. The Facts Proffered to the Court at the Rule 11 Hearing In Support of the Conspiracy to Commit Money laundering Offense Were Inaccurate

Ordinarily, sentences imposed by a federal district court judge are not subject to collateral attack. *See Gore v. United States,* 357 U.S. 386, 393 (1958). But exceptions exist, for example, where a plea is coerced or where the stipulated facts misrepresent an agreement. *See, e.g., United States v. Nelson,* 837 F.2d 15 19, 1522-25 (11th Cir. 1988) (remanding for resentencing where the government's statement of facts to the parole commission and sentencing judge misrepresented the facts stipulated to in the plea agreement). Mr. Surana's plea was coerced because he did not believe that he had any other remedy. After the USAO withdrew all of its promises to his detriment, he did not believe that he could enforce those promises and chose instead to concentrate on protecting his son, by pleading guilty to the new charge of money laundering.[15]

---

[15] Mr. Surana was forced to accept the government's proffer of the facts in part because the true facts implicated his son, Pamit, who faced prosecution after his immunity was also withdrawn. His counsel told him to go along with the government's version because "there was no other way."

In doing so, Mr. Surana allowed the government to make a factual proffer that was false. And the government *knew* that the facts proffered at the Rule 11 hearing were inaccurate, yet offered them to the Court anyway to substantiate the conspiracy to commit money laundering charge in the indictment. The government's coercion of Mr. Surana's plea and the fraud committed on this Court require that the plea be withdrawn. *Cf. United States v. Tucker,* 404 U.S. 443,447 (1972).

In *Tucker*, the United States Supreme Court found that the defendant was sentenced at least in part "on the basis of assumptions concerning his criminal record which were materially untrue." *Id.*, citing *Townsend v. Burke,* 334 U.S. 736, 741 (1948). The judge had given specific consideration to two prior convictions in formulating defendant's sentence that were later determined to be unconstitutional. *See id.* at 447. The issue before the Supreme Court was whether the defendant's sentence might have been different if the sentencing judge had been aware of the constitutional infirmity of the prior convictions. *Id.* at 447-48. The answer was a resounding "yes." *Id.* at 448.

Similarly, this Court believed that Mr. Surana had conspired to commit money laundering and imposed his sentence on that basis.[16] But, as evident by the

---

[16] The Court adopted the findings of fact and conclusions of law in the Presentence Investigation Report in their entirety. *See* Transcript of Sentencing, dated October 25, 2001, at 55, attached as Exhibit "P." In doing so, the Court adopted the probation officer's reasoning that Mr. Surana's base offense level should be 23, on the premise that the substantive offense that yields the highest base offense level should apply (in this case, the highest base offense level was that of money laundering at 23, versus 10 for bribery/extortion). U.S.S.G. §§ 2Cl.l(a); 2Sl.l; 2Xl.l(a); 3D1.3(a). The presentence investigation found that two levels should be added for Mr. Surana's role in the offense pursuant to U.S.S.G. § 3Bl.l(c), and that two levels should be subtracted for his

correspondence between Mr. Surana and the government leading up to the plea, Mr. Surana did not participate in any of the overt acts that formed the basis of this charge. In addition, Mr. Surana's situation differs from a defendant who waives his right to collaterally attack a guilty plea by agreeing to the facts alleged in the indictment at the Rule 11 hearing because Mr. Surana did not believe that the facts he was agreeing to could be used against him. *See Mabry v. Johnson*, 467 *U.S.* 504, 509 (1984) (noting that the validity of a guilty plea may be collaterally attacked "when the consensual character of the plea is called into question").

This test was outlined by the United States Supreme Court in *Brady v. United States*, 397 U.S. 742 (1970):

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment),

---

acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). Mr. Surana's timely information as to his own involvement in the case warranted another one-level decrease pursuant to U.S.S.G. § 3El.l(b)(l), making the total recommended offense level 22. From here, the Court departed downward to a level 13.

Mr. Surana's counsel, Mr. Chaykin did not object to the probation officer's sentencing calculations (see infra Part 111); thus, it is impossible to conclude whether Mr. Surana's base offense level was calculated correctly without reviewing the factual proffer and the true facts underlying the money laundering. The Court's assistance is necessary to scrutinize the facts presented here to decide whether: (a) such facts support the more stringent level of 23 under § 2S1.1; (b) the lower level of 20 under § 2S1.1 should have been applied; or (c) Mr. Surana's base offense level should have only been 10, in light of the insufficient factual predicate for the money laundering conviction.

> *misrepresentation (including unfuljilled or unfulfillable promises),* or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

467 U.S. at 755 (citations omitted) (emphasis added).

The government induced Mr. Surana to sign the August 2001 Plea Agreement based on lies. Its misrepresentations require that the promises made by the prosecutors on March 4, 1996 and in connection with the June 1996 Plea Agreement be enforced. See *Mabry v. Johnson,* 467 U.S. 504, 509 (1984) ("[W]hen it develops that the defendant was not fairly apprised of [the plea's] consequences"[17] or when "the defendant pleads guilty on a false premise" in the prosecution's plea agreement, a guilty plea violates the Due Process Clause.)

Specific performance of the March 4 Agreement would remove the money laundering objective from the charges against Mr. Surana, which is necessary because no facts support this offense. Because Mr. Surana did not believe that the factual proffer, which contained the money laundering facts, could be used against him in any way, his misunderstanding requires that the Court review the factual proffer and the sentencing calculation based upon his understanding.[18] *Nelson,* 837 F.2d at

---

[17] *See infra* Part III.

[18] It is evident that Mr. Surana did not believe that the facts that comprised the money laundering component of the plea could be used against him at sentencing, as reflected in his letter to his counsel, included with the signed factual proffer. *See* Letter to S. Chaykin from M. Surana (Exhibit M) at ¶ 2. Mr. Surana stated that he believed that the factual proffer would "not be used, disclosed, leaked, shown, or mentioned to anyone (including the media or pre-sentencing/probation investigators) because [he] intend[ed] to go forward with the entry of

1521-22 (recognizing that the defendant's understanding should be considered to determine whether the plea agreement has been violated); *In Re Arnett,* 804 F.2d at 1203 (same); *Johnson v. Beto,* 466 F.2d 478,480 (5th Cir. 1972) (same).

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

The Supreme Court has established a two-prong test to determine whether an attorney's defective performance warrants reversal of a conviction. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The first, or "performance" prong, of the test requires that a defendant show that his counsel's performance was deficient. *Id.* The performance prong looks to the professional competence of the attorney. A defendant must show that his counsel's representation fell below "an objective standard of reasonableness." *Id,* at 687-91. There is a strong presumption in such cases that counsel's conduct was within the wide range of reasonable professional assistance. *Id.*

The second, or "prejudice" prong, of the test requires that the defendant show that his defense was prejudiced by his attorney's deficient performance. *Id.* at 687. Under the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the case would have been different. "Reasonable probability" has been defined as probability "sufficient to undermine confidence in the outcome." *Id.* at 694.

Mr. Surana was prejudiced by the numerous errors made by *two* of his attorneys, who played a

---

[his] guilty plea."

significant part in his decision to plead guilty, and which resulted in a sentence of fourteen months incarceration.

### A. Ineffective Assistance by Josefsberg

When Mr. Surana finally convinced the USAO that he needed a lawyer during his initial interrogation and before he could agree to anything the government was proposing, the prosecutors chose an attorney for him, Mr. Robert Josefsberg.[19] Because the government called Mr. Josefsberg to assist Mr. Surana with his defense, it created an appearance of a conflict of interest, which was apparent in Mr. Josefsberg's handling of Mr. Surana's case, and which was never waived by Mr. Surana. *See Reynolds v. Chapman*, 253 F.3d 1337, 1342 (11th Cir. 2001) (effective assistance under the Sixth Amendment includes a right to counsel "unimpaired by conflicting loyalties.")[20]

Mr. Josefsberg's first error was failing to protest the "after-the-fact" March 4 Agreement. Mr. Surana had already given the prosecutors hours of information before their office called Mr. Jusefsberg for him. He was not

---

[19] The prosecutors handed Mr. Surana a list of three attorneys on a sheet of paper. Mr. Surana did not know any of the three names; thus, AUSAs Goldberg and Butler suggested that he retain Mr. Josefsberg. They then left the room and called Mr. Josefsberg privately, on behalf of Mr. Surana.

[20] Mr. Josefsberg later created another conflict when he agreed to represent the accounting firm of Deloitte Touche in defending a case brought by the City of Miami in late 1997, while he was counsel for Mr. Surana. In this case, Mr. Josefsberg maintained Deloitte's defenses that the City and Mr. Surana in particular were to blame for financial deficiencies. Mr. Surana did not know about nor waive this apparent conflict of interest. *See City of Miami v. Deloitte Touche*, No. 97-25179-CA-01 (Dade County filed Nov. 4, 1997).

advised of his rights before he truthfully answered the prosecutors' and agents' questions. When Bill Aaron, who was working with Mr. Josefsberg on Mr. Surana's case, arrived thereafter to begin working on the written cooperation agreement, he was too late.

His second error was to allow the government to make oral promises in exchange for Mr. Surana's cooperation. Although enforcement of the oral promises would have made the government's prosecution of the other targets of the investigation more difficult,[21] it was Mr. Josefsberg's job to protect Mr. Surana, not the government.

Mr. Josefsberg's third error was to negotiate the June 1996 Plea Agreement without any discussion with Mr. Surana. "Counsel has an obligation to consult with his client on important decisions and to keep him informed of important developments in the course of the prosecution." *Diaz v. United States,* 930 F.2d 832, 834 (11th Cir. 1991), citing *Strickland,* 466 U.S. at 688. Not only did Mr. Josefsberg not consult with Mr. Surana before signing the June 1996 Plea Agreement, he failed subsequently to explain the document to him, and failed to reconcile the government's oral promise that Mr. Surana would not lose his pension with the written proposal. *See Diaz,* 930 F.2d at 834, citing *Johnson v. Duckworth,* 793 F.2d 898, 902 (7th Cir. 1986) ("client must be involved in decision to accept or reject plea offer, and failure to inform client of offer constitutes ineffective assistance").

The fourth and most fatal error was that having done none of the above, Mr. Josefsberg advised Mr. Surana to sign the agreement without advising him of his

---

[21] *See supra* note 5.

other alternatives, including seeking to have the original promise enforced. Mr. Surana later signed the agreement, given to him by the USAO without his attorney present, and without any discussion with his attorney about the contents or the significance of the document.[22] At this time, Mr. Surana clearly believed the March 4 Agreement and oral promises made thereafter were "controlling," as evidenced by, *inter alia:* (1) the fact that he signed the June 1996 Plea Agreement; (2) by continuing to cooperate in the investigation and as an informant at great personal risk to himself and his family; and (3) by transferring his pension benefits from his fully-protected 401(k) plan to the City's pension plan on or about the same day he signed the June 1996 Plea Agreement.

There can be no doubt that had Mr. Josefsberg consulted Mr. Surana, or had he been present while the FBI and USAO repeatedly reiterated their promises to Mr. Surana, he would have been more effective in negotiating the terms of the June 1996 Plea Agreement. He would have been a witness to the government's promises to protect Mr. Surana's son from prosecution and to protect his hard-earned pension benefits. Finally. Mr. Josefsberg would have been able to obtain the significant oral promises in writing.

Mr. Josefsberg's failure to discuss the terms and consequences of the agreement as written by the government was highly prejudicial. His conduct during the plea negotiations clearly fell below "an objective standard of reasonableness" and his error was compounded when he did not advise Mr. Surana that the

---

[22] Significantly, neither Mr. Josefsberg nor Mr. Aaron ever ordered copies of the transcripts of Mr. Surana's undercover work; thus, they did not even know the evidence the government had on Mr. Surana's involvement.

government breached its agreement with him when it resubmitted the criminal Information to him in 1998. Instead, Mr. Josefsberg told the USAO that Mr. Surana would sign the Information without any discussion with him. It is beyond question that but for Mr. Josefsberg's errors, Mr. Surana would not have signed the June 1996 Plea Agreement. Further, had he known about the prosecutor's breach, he would not have pleaded guilty when presented with the fabricated indictment, or remained silent at his sentencing hearing when the government proffered inaccurate facts to the Court.

### B. Ineffective Assistance by Chaykin

Mr. Surana hired Steven E. Chaykin following Mr. Josefsberg's ineffective assistance. The government had submitted to him a criminal Information, to which he refused to plead guilty because it violated the terms of the March 4 Agreement.[23] Mr. Chaykin notified the government of such, but never advised Mr. Surana that the USAO had breached the March 4 Agreement and June 1996 Plea Agreement by bringing such charges, and that there were remedies that could be pursued.[24] This was a grave and unreasonable error that led to the indictment of Mr. Surana *and his son* in violation of the earlier promises, which Mr. Surana felt he had no choice but to accept.

In addition to Mr. Chaykin's error in not pursuing the prosecutors' breach, he again erred at the Rule 11 hearing by not objecting to the government's factual

---

[23] Among other reasons, the charge of conspiracy to commit bribery and extortion was a felony, which Mr. Surana believed if he pleaded guilty to, would implicate his pension benefits under Florida law. *See* Fl. Stat. Ann. § 112.3173.

[24] *See supra* Parts I and II.

proffer, which he knew was inaccurate. *Cf. Collier v. Turpin,* 177 F.3d 1184, 1202 (11th Cir. 1999) (finding defense counsel to be ineffective where he failed to present mitigating evidence at sentencing); *Dobbs v. Turpin,* 142 F.3d 1383, 1387 (11th Cir. 1998) (same). The government's proffer was the only support for the conspiracy to commit money laundering charge, and Mr. Chaykin allowed the Court to accept the manufactured facts as true.[25] It is unquestionable that Mr. Chaykin's failure to object falls below the objective standard for professional assistance. This error was especially serious because the inaccurate facts formed the basis for the offense that caused Mr. Surana to be sentenced at a higher offense level than he would have been if judged solely on his own conduct.

## PRAYER FOR RELIEF

WHEREFORE, for all the foregoing reasons, Manohar Surana respectfully requests that this Court

1) grant an evidentiary hearing on this Motion; and

2) allow him to be released to house arrest with electronic monitoring, or to a halfway house, immediately pending determination of this Motion; and

---

[25] With only two caveats (that Mr. Surana did not agree or admit that he solicited or received any payments for his personal benefit, and Mr. Surana did not admit any of the overt acts in Count I of the indictment), Mr. Chaykin concurred with the government's factual proffer. *See* Transcript of Plea (Exhibit O) at 17. Also, at the sentencing hearing, Mr. Chaykin allowed the court to believe that the facts proffered by the government on August 6, 2001 and in the Presentence Investigation Report were accurate when he stated that he had no objections. *See* Transcript of Sentencing (Exhibit P) at 3.

3) permit him to withdraw his plea of guilty; or, in the alternative,

4) withdraw the money laundering component of his plea and resentence him on that basis.

Respectfully submitted,
By: /s/ David Raben
David Raben
Robbins, Tunkey, Ross, Amsel, Raben,
Waxman & Eiglarsh, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, FL 33129
(305) 858-9550
(305) 858-7491 (facsimile)

Nancy Luque
Donna M. Sheinbach
REED SMITH LLP
1301 K Street, NW
Suite 1100–East Tower
Washington, DC 20005
(202) 414-9408
(202) 414-9299 (facsimile)

Counsel for Manohar Surana

DATED: July 30,2002

STATE OF VIRGINIA )
COUNTY OF PRINCE GEORGE )

Before me, the undersigned authority, this day personally appeared MANOHAR SURANA, who first being duly sworn, says that he is the defendant in the above-styled cause, that he has read the foregoing Motion to Withdraw Guilty Plea and has personal knowledge of the facts and matters therein set forth and alleged and that each and all of these facts and matters are true and correct.

/s/ Manohar Surana
MANOHAR SURANA

SWORN AND SUBSCRIBED before me this 25 day of July 2002.

[NOTARY SEAL]

Personally Known: _____
Produced Identification: _____
Type: _____

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was delivered this 31 day of July, 2002, to the United States Attorney's Office, 99 N.E. Fourth Street, Miami, Florida 33132.

ROBBINS, TUNKEY, ROSS, AMSEL,
RABEN, WAXMAN & EIGLARSH, P.A.
/s/ David Raben
DAVID RABEN

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**

**MANOHAR SURANA,**
**Plaintiff,**

**v.** **Case No.: _____**

**UNITED STATES OF AMERICA,**
**Defendant.**

**ORDER**

Upon consideration of Mr. Surana's Motion to Withdraw Guilty Plea, it is this ___ day of _____,2002, hereby

ORDERED that Mr. Surana be released to house arrest with electronic monitoring pending the Court's determination of this Motion; and further

ORDERED that a hearing is scheduled on this Motion for the _____ day of _____ at ____ am/pm.

_____
Hon. Paul C. Huck
United States District Court Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**

**MANOHAR SURANA,**
**Plaintiff,**

**v.** **Case No.: _____**

**UNITED STATES OF AMERICA,**
**Defendant.**

**ORDER**

Upon consideration of Mr. Surana's Motion to Withdraw Guilty Plea, it is this ___ day of _____,2002, hereby

ORDERED that Mr. Surana's Motion is GRANTED; and it is further

ORDERED that his plea of guilty be hereby withdrawn.

_____
Hon. Paul C. Huck
United States District Court Judge

## CERTIFICATE OF SERVICE

Amended

I hereby certify that the foregoing Motion to Withdraw Guilty Plea was served, via first-class mail, postage prepaid, on this 30th day of July, 2002, on the following:

Michael J. Mullaney
Assistant United States Attorney
99 N.E. 4th Street
Miami, Florida 33132

/s/ David Raben
David Raben

JS 44 (Rev. 12/96) 02-22289

[Stamp]Magistrate Judge Turnoff
[Date Stamp] 02 Jul 31 PM 2:33

**CIVIL COVER SHEET**

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I.(a)PLAINTIFFS**
MANOHAR SURANA

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF
DADE
(EXCEPT IN U.S. PLAINTIFF CASES)

Dade 02-22289 CIV

(c) ATTORNEY'S (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
David Raben
Robbins, Tunkey, Ross, et. al.
2250 SW 3rd AVenue, 4th Floor
Miami, FL 33129 305-858-9550

**I.(a)DEFENDANTS**
UNITED STATES

(b) COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT DADE

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (IF KNOWN)

Mike Mullaney, AUSA
U.S. Attroney's Office
Miami, FL 33132 305-961-9000

(d) CIRCLE COUNTY WHERE ACTION AROSE:
**DADE**, MONROE, BROWARD, PALM BEACH, MARTIN, ST. LUCIE. INDIAN RIVER, OKEECHOBEE HIGHLANDS

**II. BASIS OF JURISDICTION** (PLACE AN "X" IN ONE BOX ONLY)

| | |
|---|---|
| ☐1 U.S. Government Plaintiff | ☐3 Federal Question (U.S. Government Not a Party) |
| ☒2 U.S. Government Defendant | ☐4 Diversity (Indicate Citizenship of Parties in Item III) |

**III. CITIZENSHIP OF PRINCIPAL PARTIES**
(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

| | PTF | DEF |
|---|---|---|
| Citizen of This State | ☐ 1 | ☐ 1 |
| Citizen of Another State | ☐ 2 | ☐ 2 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 |
| Incorporated *or* Principal Place | ☐ 4 | ☐ 4 |

| | | |
|---|---|---|
| of Business In This State | | |
| Incorporated *and* Principal Place of Business In Another State | □ 5 | □ 5 |
| Foreign Nation | □ 6 | □ 6 |

**IV. ORIGIN** (PLACE AN "X" IN ONE BOX ONLY)
☒1 Original Proceeding
□2 Removed from State Court
□3 Remanded from Appellate Court
□4 Reinstated or Reopened
□5 Transferred from another district (specify)
□6 Multidistrict Litigation
□7 Appeal to District Judge from Magistrate Judgment

**V. NATURE OF SUIT** (PLACE AN "X" IN ONE BOX ONLY)

**A CONTRACT**

□110 Insurance □120 Marine □130 Miller Act □140 Negotiable Instrument □150 Recovery of Overpayment & Enforcement of Judgment □151 Medicare Act B□152 Recovery of Defaulted Student Loans (Excl. Veterans) B□153 Recovery of Overpayment of Veteran's Benefits □160 Stockholders' Suits □190 Other Contract □195 Contract Product Liability

**A REAL PROPERTY**

□210 Land Condemnation B□220 Foreclosure □230 Rent Lease & Ejectment □240 Torts to Land □245 Tort Product Liability □290 All Other Real Property

**A TORTS**

PERSONAL INJURY

□310 Airplane □315 Airplane Product Liability □320 Assault, Libel & Slander □330 Federal Employers' Liability □340 Marine □345 Marine Product Liability □350 Motor Vehicle □355 Motor Vehicle Product Liability □360 Other Personal Injury □362 Personal Injury— Med. Malpractice □365 Personal Injury — Product Liability □368 Asbestos Personal Injury Product Liability

**PERSONAL PROPERTY**

□370 Other Fraud □371 Truth in Lending □380 Other Personal Property Damage □385 Property Damage Product Liability

**A CIVIL RIGHTS**

□441 Voting □442 Employment □443 Housing/ Accommodations □444 Welfare □440 Other Civil Rights

**PRISONER PETITIONS**

B☒510 Motions to Vacate Sentence

**HABEAS CORPUS:**

B□530 General A□535 Death Penalty B□540 Mandamus & Other B□550 Civil Rights B□555 Prison Condition

**FORFEITURE/PENALTY**

B□610 Agriculture B□620 Other Food & Drug B□625 Drug Related Seizure of Property 21 USC 881 B□630 Liquor Laws B□640 R.R. & Truck B□650 Airline Regs. B□660 Occupational Safety/Health B□690 Other

**A LABOR**

□710 Fair Labor Standards Act □720 Labor/Mgmt. Relations □730 Labor/Mgmt.Reporting & Disclosure Act

□740 Railway Labor Act □790 Other Labor Litigation
A□791 Empl. Ret. Inc. Security Act

**A BANKRUPTCY**

□422 Appeal 28 USC 158 □423 Withdrawal 28 USC 157

**A PROPERTY RIGHTS**

□820 Copyrights □830 Patent □840 Trademark

**B SOCIAL SECURITY**

□861 HIA (1395ff) □862 Black Lung (923) □863 DIWC/DIWW (405(g)) □864 SSID Title XVI 865 RSI (405(g))

**FEDERAL TAX SUITS**

A□870 Taxes (U.S. Plaintiff or Defendant) A□871 IRS—Third Party 26 USC 7609

**A OTHER STATUTES**

□400 State Reapportionment □410 Antitrust □430 Banks and Banking B□450 Commerce/ICC Rates/etc. □460 Deportation □470 Racketeer Influenced and Corrupt Organizations □810 Selective Service □850 Securities/ Commodities/Exchange □875 Customer Challenge 12 USC 3410 □891 Agricultural Acts □892 Economic Stabilization Act □893 Environmental Matters □894 Energy Allocation Act □895 Freedom of Information Act □900 Appeal of Fee Determination Under Equal Access to Justice □950 Constitutionality of State Statutes □890 Other Statutory Actions
A OR B

**VI. CAUSE OF ACTION** (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE.
DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

LENGTH OF TRIAL
via 2 days estimated (for both sides to try entire case)

MOTION TO VACATE CONVICTION AND SENTENCE UNDER 28 U.S.C. §2225

**VII. REQUESTED IN COMPLAINT:**

□CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P 23

**DEMAND $**

CHECK YES only if demanded in complaint:

**JURY DEMAND**: □YES ☒NO

**VIII. RELATED CASE(S) IF ANY** (See instructions):

JUDGE_____ DOCKET NUMBER _____

DATE
7/31/02

SIGNATURE OF ATTORNEY OF RECORD

/S/ DAVID RABEN
DAVID RABEN, ESQ.

FOR OFFICE USE ONLY

RECEIPT #_____ AMOUNT _____
APPLYING IFP_____ JUDGE_____
MAG. JUDGE_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MANOHAR SURANA,
Plaintiff,

[DATE STAMP
OCT 28 2002]

v.

CLOSED
CIVIL
CASE

UNITED STATES OF AMERICA,
Defendant.

**ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA**

THIS CAUSE is before the Court on the Petitioner/Plaintiff, Manohar Surana's Motion to Withdraw Guilty Plea. Based on the findings of fact and conclusions of law announced in open court on October 25, 2002, which are made a part of this order by reference, the Motion is DENIED. All other pending motions are denied as moot and the Clerk is directed to close this case.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

cc: Michael Mullaney, AUSA
David Raben, Esq.
Eric Dubelier, Esq.
Nancy Luque, Esq.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

CASE NO 02-22289-CV-HUCK/TURNOFF
(00-1045-CR-HUCK)

[DATE STAMP
2003 JAN 22 AM 9:58]

**MANOHAR SURANA,,**
Defendant-Movant

v.s

**UNITED STATES OF AMERICA,**
Respondent.

**SURANA'S NOTICE OF APPEAL AND REQUEST FOR CERTIFICATE OF APPEALABILITY**
***NOTICE OF APPEAL***

Notice is hereby given that Manohar Surana, Defendant-Movant in the above named case, by and through his undersigned counsel, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgement and denial of Surana's motion for relief filed pursuant to 28 United States Code 2255 entered on the 28th day of October, 2002 and the denial of his request for Certificate of Appealability dated December 13,2002..

***REQUEST FOR CERTIFICATE OFAPPEALABILITY***

The Defendant-Movant moves this court for a grant of a Certificate of Appealability, pursuant to 28 U.S.C. 2253(a), (c)(1)(B).

Surana asserts that the breached inducment by the prosecutors in this case, as well as the ineffectiveness of counsel as to proper legal advice and misrepresentation of the case and consequences of his plea meet the requirements of Section 102 of the Antiterrorism and EffectiveDeath Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, 1217 (the Act), amends § 2253 to requiring a "certificate of appealability" before a prisoner may appeal from a district court's denial of his motion and providing that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to a court of appeals from * * * the final order in a proceeding under section 2255."

Surana claims that, before accepting a plea of guilty or nolo contendere, the court failed to inform him of, and determine that he understands the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any supervised release term. Federal Rules of Criminal Procedure 11(c).

Surana claims that the court did not determine that the plea was voluntary and not the result of promises apart from a plea agreement. The Court shall also inquire whether the defendant's willingness to plead guilty resulted from prior discussions between the attorney for the government and the defendant or his attorney. Federal Rules of Criminal Procedure 11.

The court does not have the authority to accept either a plea of guilty or a plea of nolo contendere until the court has first determined that the defendant has a requisite understanding and that the plea is voluntary, in accordance with Federal Rules of Criminal Procedure 11(c) and (d). *See McCarthy v. United States,* 394 U.S. 459

(1969); *Boykin v. Alabama*, 395 U.S. 238 (1969). The requirement in Rule 11(f) that the court not enter a judgment upon a guilty plea without determining that there is a factual basis for the plea, does not extend to criminal forfeiture charged under Federal Rule of Criminal Procedure 7 since such forfeiture is part of the sentence, not the offense. *See Libretti v. United States*, 116 S. Ct. 356 (1995). This the court failed to do in this case to the prejudice of the Defendant.

Surana claims that he has made a substantial showing of the denial of a constitutional right," and has "indicate(d) which specific issue or issues satisfy the showing required" within the pleadings filed before this court. See former 28 U.S.C. § 2253; *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991); *Houchin v. Zvaras*, 924 F. Supp. 115 (D. Colo. 1996) (identifcation of specific issues).

On the basis of the foregoing, the Defendant, Manohar Surana, by and through his undersigned counsel, files this notice of appeal and moves this court for the grant of a certificate of appealability.

Submitted

/s/ Alvin E. Entin
Alvin E. Entin, Esq.
Counsel for Surana
Entin, Margules, and Della Fera, P.A.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by first class U.S. mail on this 17th day of January, 2003 to Clerk of Court for the United States District Court for the Southern District of Florida at 301 North Miami Avenue, Miami, Florida 33128 and a copy to the United States Attorney Office at 99 Northeast 4th Street, Miami, Florida 33132.

I affirm that the above is true and correct under the laws of perjury.

Submitted:

/s/ Alvin E. Entin
Alvin E. Entin, Esq.
Entin, Margules, and Della Fera P.A.
AutoNation Tower; Suite 1970
110 Southeast Sixth Street
Fort Lauderdale, Florida 33301
Telephone: (954) 761 -7201
Fax: (954) 767-8343

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.: 02-22289-CIV-HUCK**
**(00-1045-CR-HUCK)**

[DATE STAMP
DEC 17 2002]

MANOHAR SURANA,
Petitioner,

v.

[DATE STAMP
[DEC 13 2002]

UNITED STATES OF AMERICA,
Respondent.

**ORDER DENYING CERTIFICATE OF APPEALABILITY**

THIS MATTER is before the Court upon Petitioners Notice of Appeal, filed December 11, 2002. Pursuant to 28 U.S.C. § 2253(c) an appeal may not be take from a final order in a habeas corpus proceeding unless a Certificate of Appealability ("COA") is issued. Even though Petitioner has not moved for a COA, "District Courts must treat notices of appeal by petitioners following a denial of either a section 2254 or a section 2255 petition as applications for COAs" *Edwards v. United States*, 114 F.3d 1083, 1084 (11th Cir. 1987). The COA must contain a finding that the applicant has made a substantial showing of the denial of a constitutional right and must indicate which specific issues satisfy the required showing. Applying these standards, the Court finds that there has been no substantial showing of a denial of a constitutional right. Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's request for a COA is hereby DENIED and a Certificate of Appealability SHALL NOT ISSUE.

DONE AND ORDERED in Chambers, Miami, Florida, this 13th day of December, 2002.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

Copies furnished to:
Nancy Luque, Esq., Attorney for Petitioner
Michel J. Mullaney, AUSA
Magistrate Judge Sorrentino
Deborah Ferguson-Christian, Operations Supervisor, Appeals

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.: 02-22289-CIV-HUCK/TURNOFF**
**(00-1045-CR-HUCK)**

MANOHAR SURANA.
Defendant-Movant,

[DATE STAMP
JAN 2 2003]

v.

UNITED STATES OF AMERICA,
Respondent.

**ORDER DENYING CERTIFICATE OF APPEALABILITY**

THIS MATTER is before the Court upon Defendant-Movant Manohar Surana's Notice of Appeal and Request for Certificate of Appealability, filed January 22, 2003. Pursuant to 28 U.S.C. § 2253(c), an appeal may not be take from a final order in a habeas corpus proceeding unless a Certificate of Appealability ("COA") is issued. The COA must contain a finding that the applicant has made a substantial showing of the denial of a constitutional right and must indicate which specific issues satisfy the required showing. *See id.* Applying this standard, the Court finds that there has been no substantial showing of a denial of a constitutional right. Accordingly, it is

ORDERED AND ADJUDGED that Petitioner's request for a COA is hereby DENIED and a Certificate of Appealability SHALL NOT ISSUE.

DONE AND ORDERED in Chambers, Miami, Florida, this 23rd day of January, 2003.

/s/ Paul C. Huck
Paul C. Huck
United States District Judge

[DATE STAMP
JAN 28 2003]

Copies furnished to:
District Court Clerk's Office, Appeals Division
All Counsel of Record

**United States Court of Appeals**
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

**Thomas K. Kahn**
Clerk

In Replying Give Number Of Case And Names of Parties

March 27, 2003

[DATE STAMP MAR 31 2003]

Clarence Maddox
Clerk, U.S. District Court
301 N. Miami Avenue
Miami FL 33128

RE: 02-16743-1 Manohar Surana v. USA
DC DKT NO.: 02-22289 CV-PCH
SECONDARY CASE NO: 00-01045 CR-PCH

The enclosed certified copy of this Court's order denying the application for a Certificate of Appealability is issued in lieu of the mandate of this court. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Also enclosed is the record on appeal, which consists of:
1 volumes of pleadings
2 expansion file folder

The district court clerk is requested to acknowledge receipt on the copy of this letter enclosed to the clerk.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Pamela Allen (404) 335-6188

Encl.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[DATE STAMP
MAR 27 2003]

No. 02-16743-1

MANOHAR SURANA,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent- Appellee.

Appeal from the United States District Court for the Southern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

[CERTIFICATION STAMP
U.S. COURT OF APPEALS]

5/19/03 -- USCA Case Number as to Manohar Surana

1. USCA NUMBER: 02-16743-I In Re: Appellant has filed a "Petition for Panel Rehearing for a Grant of Certificate of Appealability," which is construed as a motion for reconsideration of this Court's order dated March 27, 2003. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. (hh)